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Supreme Court, U.S.
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No. 01-407

In The

Supreme Court of the United States

FRANK W. BUGRYN, JR., MARY DUDKO, MICHAEL DUDKO, AND JOHN BUGRYN,

Petitioners,

v.

CITY OF BRISTOL, PLANNING COMMISSION OF THE CITY OF BRISTOL, AND THE BRISTOL DEVELOPMENT AUTHORITY,

Respondents.

On Petition For A Writ Of Certiorari To The Appellate Court Of The State Of Connecticut

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. If a municipality exercises its condemnation authority in such a manner that a specific and identifiable interest may benefit from the condemnation, do the Fifth and Fourteenth Amendments to the United States Constitution require the application of heightened scrutiny in determining whether the condemnation is being carried out for a public use?

2. If the answer to the first question is "yes," is heightened scrutiny warranted in this case where the trial court considered all the evidence regarding the circumstances surrounding the condemnation and concluded that the purpose of the taking was to develop a multi-lot industrial park that would proceed with or without the involvement of a particular private entity that never committed to purchasing one of the lots in the industrial park?

LIST OF PARTIES AND AFFILIATES

The names of all parties to the proceedings before the Connecticut Appellate Court appear in the caption of the case. Bristol is a city in the state of Connecticut. There are no corporate petitioners.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES AND AFFILIATES..... ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW..... 1

JURISDICTION..... 1

STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE WRIT 5

1. The Petitioners' Claim Is Contrary To Decisions Of This Court And Is Unsupported By Any Federal Case Law 6

2. Petitioners' "Heightened Scrutiny" Claim Is Grounded In State Constitutional Law 12

3. The Factual Predicate For The Petitioners' Claim Was Rejected By The Trial Court..... 18

4. The Case Is Moot..... 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Acco Unlimited Corp. v. City of Johnston, 611 N.W.2d 506 (Iowa 2000) 15

AMSAT Cable Ltd. v. Cablevision Ltd. Partnership, 6 F.3d 867 (2nd Cir. 1993) 9, 10, 13, 15

Avalonbay Communities, Inc. v. Orange, 256 Conn. 557, ___ A.2d ___ (2001) 17

Berman v. Parker, 348 U.S. 26 (1954). 7, 8, 10, 11, 16, 23

Bugryn v. City of Bristol, 63 Conn. App. 98, 774 A.2d 1042, *cert. denied*, 256 Conn. 927, 776 A.2d 1143 (2001) 5

Calderon v. Moore, 518 U.S. 149 (1996) 22

Casino Reinvestment Development Authority v. Banin, 320 N.J. Super. 342 (N.J. Law Div. 1998) 16

Church of Scientology of California v. United States, 506 U.S. 9 (1992) 22

Cincinnati v. Vester, 281 U.S. 439 (1930)..... 7

City of Atlantic City v. Cynwyd Investments, 148 N.J. 55, 689 A.2d 712 (1997).....15, 16

City of Lansing v. Edward Rose Realty, 442 Mich. 626, 502 N.W.2d 638 (1993) 13, 14

City of Lansing v. Edward Rose Realty, Inc., 192 Mich.App. 551, 481 N.W.2d 795 (Mich. App.), *aff'd*, 442 Mich. 626, 502 N.W.2d 638 (Mich. 1993)..... 9

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Hawley v. South Bend, Dept. of Redevelopment, 270 Ind. 109, 383 N.E.2d 333 (1978) 16, 17

International Paper Co. v. United States, 282 U.S. 399 (1931) 12

Joslin Mfg. Co. v. Providence, 262 U.S. 668 (1923) 11

Minneapolis Comm. Dev. Agency v. Opus Northwest, LLC, 582 N.W.2d 596 (Minn. Ct. App.), *review denied*, 1998 Minn. LEXIS 779 (1998) 15

National Railroad Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992) 6, 8, 10

Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981) ..... *passim*

Richardson v. City and County of Honolulu, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998) 7, 9

Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923) 7

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 6

Small Landowners v. City and County of Honolulu, 832 F.Supp. 1404 (D. Hawaii 1993), *aff'd, Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998) 9

Tolksdorf v. Griffith, 464 Mich. 1, 626 N.W.2d 123 (2001) 14

Township of West Orange v. 769 Associates, LLC, 341 N.J.Super. 580, 775 A.2d 657 (N.J. App. Div. 2001) 16

TABLE OF AUTHORITIES – Continued

Page

Union Lime Co. v. Chicago & N.R. Co., 233 U.S. 211 (1914) 7

Vance v. Bradley, 440 U.S. 93 (1979) 9

Wilmington Parking Authority v. Land With Improvements, 521 A.2d 227 (Del. 1987) 13, 14, 17, 21

STATUTES

28 U.S.C. § 1257(a) 1

45 U.S.C. § 562 9

Conn. Gen. Stat. § 32-220 3

Conn. Gen. Stat. § 32-222 2

Conn. Gen. Stat. § 32-224 ..... 2, 3, 9

OTHER AUTHORITIES

2A Nichols on Eminent Domain (3rd Ed.), § 7.03[5][a] 11

Annotation, "Eminent Domain – Public Use," 81 L.Ed.2d 931 (1984) 7

OPINIONS BELOW

The order of the Connecticut Supreme Court denying the petitioners' petition for certification was issued on June 7, 2001, and is reported at 256 Conn. 927, 776 A.2d 1143 (2001). The opinion of the Connecticut Appellate Court is reported at 63 Conn. App. 98, 774 A.2d 1042 (2001). The opinion of the Connecticut Superior Court (Kremski, S.T.R.) dated January 31, 2000 is unreported. All three of these decisions are reprinted in the petitioners' appendix to the Petition for Writ of Certiorari.

JURISDICTION

The Connecticut Supreme Court denied the petitioners' petition for certification on June 7, 2001. The Connecticut Appellate Court entered judgment on April 24, 2001. The petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). As outlined below in section four of the "Reasons For Denying The Writ," the respondents contend that this case is moot.

STATEMENT OF THE CASE

On May 25, 1999, the City of Bristol deposited $1.29 million in the Superior Court of Connecticut in order to commence condemnation proceedings with regard to two parcels of land owned by respondents that were being taken in connection with the City's plans to develop an industrial park. The Bristol Development Authority and

the Bristol City Council had previously voted unanimously to approve the project plan for the Southeast Bristol Mini-Industrial Park, which will include twelve-fifteen industrial lots.[1] Prior to obtaining these approvals, the Project Plan had been the subject of multiple public hearings and had been reviewed and approved by the Bristol Planning Commission, the Central Connecticut Regional Planning Agency, and numerous state agencies.

As required by C.G.S. § 32-224(b)(12), the City Council and the Bristol Development Authority specifically found as part of the approval process that the land and buildings within the boundaries of the project area will be used "principally for manufacturing or other economic base business purposes or business support services" and that the project will contribute to the economic welfare of the City of Bristol and the State of Connecticut. According to the Project Plan prepared by an independent consultant, the net present value of the excess of tax revenues over the estimated cost of development is approximately $8.9 million. The Project Plan also states that after 10 years the industrial park will create between 396 and 594 jobs for the City.

The City of Bristol ranks in the top 25% of Connecticut's poorest towns. It is considered an economically disadvantaged community and a "targeted investment community" under Conn. Gen. Stat. § 32-222(u). Like many of the old manufacturing towns in the Northeast,

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[1] Under the project plan, the two parcels owned by petitioners will be subdivided into four industrial lots.

manufacturing employment in Bristol has declined steadily over the years. The number of manufacturing jobs in the city declined in part as a result of several plant shutdowns that occurred beginning in the 1970s. The unemployment rates in Bristol in the 1990s were consistently greater than the state and regional averages.

The petitioners filed an action to enjoin the takings in the Connecticut Superior Court. The petitioners' principal claim was that the taking was designed to benefit a private entity (Yarde Metals). In the proceedings below, the petitioners never challenged the constitutionality of Conn. Gen. Stat. §§ 32-220 et seq., the Connecticut Economic Development and Manufacturing Assistance Act of 1990 ("the Act"), under which these condemnation actions were brought. Moreover, petitioners did not dispute that: (1) one of the purposes of the Act was to promote the development of industrial parks; (2) an industrial park developed under the Act is a public use; (3) the respondents complied with all necessary procedures required for exercising the power of eminent domain under the Act; and (4) the Bristol City Council and Bristol Development Authority made the necessary factual findings required under Conn. Gen. Stat. § 32-224(b)(12), including a finding that the industrial park will contribute to the economic welfare of the city and the state.

After hearing four days of testimony from petitioners, the mayor of the City of Bristol, the director of the Bristol Development Authority, and the president of Yarde Metals, the trial court denied the injunctive relief requested. This testimony focused on the origins of the project, the reasons why the City sought to develop the

industrial park, whether the City's primary purpose was to provide a benefit to Yarde Metals as alleged by petitioners, and whether the project would proceed even if Yarde Metals elected to relocate elsewhere.[2] The trial court rejected petitioners' claim that the purpose of the taking was to benefit Yarde Metals, noting that Yarde Metals' involvement in the project remained in doubt and finding that the City intended to proceed with the industrial park with or without Yarde Metals.

The Connecticut Appellate Court affirmed the trial court's ruling in a unanimous decision, and the Connecticut Supreme Court subsequently denied certification of the same issue the petitioners are now asking this Court

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[2] The mayor of Bristol and the director of the Bristol Development Authority testified that they always intended to proceed with the project whether or not Yarde Metals elected to relocate to the industrial park. Craig Yarde, the president of Yarde Metals, testified that, although he was interested in relocating to the industrial park, he had never committed to the City – contractually or otherwise – to purchase one of the lots because: (1) he had been looking to relocate since 1996 in order to eliminate the costs of operating out of multiple facilities, and the delays and uncertainties occasioned by this litigation had caused him to look for sites elsewhere; (2) until the litigation was ultimately resolved and the City's ownership was beyond dispute, Mr. Yarde could not know the configuration of the land the City could sell and whether the land that was ultimately available would meet his company's expansion needs at that time. In addition to Yarde Metals, the City received a number of inquiries from other companies interested in relocating to this industrial park. The director of the Bristol Development Authority testified regarding his efforts to market the industrial park to companies located throughout the Northeast and Mid-Atlantic regions.

to review.[3] *Bugryn v. City of Bristol*, 63 Conn. App. 98, 774 A.2d 1042, *cert. denied*, 256 Conn. 927, 776 A.2d 1143 (2001). Additional facts relating to the respondents' claim that this case is moot are set forth in section four below.

REASONS FOR DENYING THE WRIT

Petitioners contend that the Fifth and Fourteenth Amendments to the United States Constitution require "heightened scrutiny" in determining whether a condemnation is being carried out for a public use if the condemnation power is exercised in such a manner that a specific and identifiable private interest may benefit. This contention is contrary to numerous decisions of this Court and would thus require the outright reversal of long-settled precedent of this Court. In fact, there is not a single federal court decision that supports petitioners' claim. The petitioners seek review based upon the decisions of the highest courts in two states that appear to disregard the fact that the "heightened scrutiny" standard sought by petitioners arose out of state constitutional law in Michigan. Moreover, the petitioners' claim is based upon a factual predicate that the trial court rejected in its fact-bound decision after fully considering all the evidence

[3] The three-member panel of the Appellate Court included Justice Ellen Peters, former Chief Justice of the Connecticut Supreme Court. Prior to her service on the Connecticut Supreme Court, Justice Peters was a professor at Yale Law School from 1956 to 1978. The respondents incorporate by reference the facts set forth in the decisions of the Appellate Court and the trial court, which are included in the Appendix to the Petitioners' Brief.

presented by petitioners regarding the public use issue. The trial court's inquiry into all the facts and circumstances surrounding the condemnation satisfied even the "heightened scrutiny" that petitioners advance. Finally, the issue raised by petitioners is moot because their claim for heightened scrutiny is based upon an alleged benefit to Yarde Metals, and Yarde Metals purchased an industrial plant in another town while this case was on appeal and thus will not be relocating to the Southeast Bristol Mini-Industrial Park. The petition is without merit and should be denied.

1. The Petitioners' Claim Is Contrary To Decisions Of This Court And Is Unsupported By Any Federal Case Law.

The most striking aspect of petitioners' brief is the absence of a single citation to a federal court decision supporting their claim. The reason for this pregnant omission is simple: this Court has long held that the role of courts in reviewing a claim that a particular exercise of the condemnation power does not serve a public use is a limited one. *See National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992) (holding that Court will not strike down a condemnation based upon the public use requirement so long as the taking is "rationally related to a conceivable public purpose," in rejecting private railroad's challenge to condemnation of its property by Interstate Commerce Commission for benefit of Amtrak); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984) ("[t]he role of the courts in second-guessing the legislature's judgment of what constitutes a public use is extremely narrow."); *Hawaii Housing Authority v.*

Midkiff, 467 U.S. 229, 240-41 (1984) (the scope of the public use requirement is "coterminous with the scope of a sovereign's police powers" and the judiciary should defer to legislature's public use determination unless the use involves an "impossibility" or is "palpably without reasonable foundation"); *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("[t]he role of the judiciary in determining whether that power [of eminent domain] is being exercised for a public purpose is an extremely narrow one"); *see also Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1157-58 (9th Cir. 1997), *cert. denied*, 525 U.S. 871, 168 (1998) (rejecting claim that city land reform ordinance violated public use requirement and holding that minimum scrutiny test set forth in *Midkiff* applied rather than heightened scrutiny sought by landowners). Thus, despite the relative frequency with which challenges to the eminent domain power are based upon claims that no public use is served, no federal court has ever adopted the heightened scrutiny test proposed by petitioners. This speaks volumes about the merits of petitioners' claim.[4]

In *Hawaii Housing Authority v. Midkiff*, wherein this Court first held that the public use requirement is coterminous with the scope of the police power, the Court

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[4] This Court has also repeatedly held that it regards with great respect judgments of state courts as to what constitutes a public use, and such judgments should be upheld unless clearly without ground. *See Cincinnati v. Vester*, 281 U.S. 439, 446 (1930); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 706 (1923); *Union Lime Co. v. Chicago & N.R. Co.*, 233 U.S. 211 (1914); *see generally Annotation*, "Eminent Domain – Public Use," 81 L.Ed.2d 931, § 3, at 937-39, and cases cited therein.

upheld the constitutionality of a land reform statute that authorized the use of eminent domain for the specific purpose of transferring the property to another private entity. 467 U.S. at 239-245. The court held that:

> There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even where the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is 'an extremely narrow' one. . . . In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use, 'unless the use be palpably without reasonable foundation.' . . .
>
> To be sure, the Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.' . . . But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.

Id. at 240-41.[5]

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[5] While *Berman* and *Hawaii Housing Authority v. Midkiff* involved challenges to the constitutionality of a statute, the standard of review set forth in these cases and their progeny is equally applicable to legal challenges to particular exercises of a legislatively-delegated condemnation power by federal or local agencies. *See National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. at 422-423 (applying *Midkiff* deferential standard to a challenge to a condemnation by Interstate Commerce Commission for benefit of Amtrak pursuant to eminent domain

The only federal court that has specifically addressed petitioners' argument soundly rejected it. In *AMSAT Cable Ltd. v. Cablevision Ltd. Partnership*, 6 F.3d 867, 875 (2nd Cir. 1993), the Second Circuit stated:

> Plaintiffs rely on a case applying a Michigan Constitutional test requiring a "clear and significant" showing that a condemnation statute that serves private interests is predominantly directed toward serving public interests. *City of Lansing v. Edward Rose Realty, Inc.*, 192 Mich. App. 551, 481 N.W.2d 795 (Mich. App.), *aff'd*, 442 Mich. 626, 502 N.W.2d 638 (Mich. 1993) (discussing state and federal standards). However, the federal standard is otherwise. As stated in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241, 104 S.Ct. 2321, 2329, 81 L.Ed.2d 186 (1984), the exercise of eminent domain power will be upheld where it is "rationally related to a conceivable public purpose. . . . "

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power under 45 U.S.C. § 562(d)); *Small Landowners v. City and County of Honolulu*, 832 F.Supp. 1404, 1409 (D. Hawaii 1993), *aff'd, Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998) (judicial deference given to legislative findings of public use is equally applicable to findings of municipality required as conditions for exercise of eminent domain power, citing *Vance v. Bradley*, 440 U.S. 93, 110-111 (1979)). In the present case, both the Bristol Planning Commission and the Bristol City Council were required under Conn. Gen. Stat. § 32-224(b)(12) to find, prior to authorizing the condemnation, that "the land and buildings within the boundaries of the project area will be used principally for manufacturing or other economic base business purposes or business support services" and that "the project will contribute to the economic welfare of the City of Bristol and the State of Connecticut."

Id. at 875. Respondents have been unable to find any other federal decisions that discuss the decisions of the Michigan, Delaware, and New Jersey courts relied upon by petitioners in support of their claim for "heightened scrutiny." The reason for the dearth of federal case law on this issue is clear: "heightened scrutiny" is contrary to every decision of this Court addressing the issue.

The petitioners' claim that federal law is unclear as to the degree of scrutiny required where there is a *direct* benefit to a specific and identifiable private entity (as opposed to *some* benefit) is patently incorrect. In numerous cases addressed by this Court there was clearly a *direct* benefit to a private entity as a result of a taking, but the court applied a deferential standard in reviewing the public use issue. In *National Railroad Passenger Corp., Midkiff* and *Berman*, the condemnation resulted in the transfer of ownership from one private party to another, and this Court applied the same test: whether the taking is rationally related to a conceivable public purpose. *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. at 422 (ICC condemned railroad property to be transferred to Amtrak, a private corporation); *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 240-43 (land reform legislation resulted in transfer of condemned property to private owners in order to address land oligopoly); *Berman v. Parker*, 348 U.S. at 32-34 (where redevelopment statute allowed property taken to be transferred to private redevelopers, Court held that "[w]e cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects"). In all of these cases, there was a substantial and direct benefit to the private party who ultimately

acquired the condemned parcel, and the Court applied the same deferential standard of review in each case.

The petitioners provide absolutely no explanation or delineation between condemnations that provide *some* benefit, as opposed to those that provide a *direct* benefit, to a private entity. This is simply a meaningless distinction that represents an attempt to create confusion in the case law where there is none. Heightened scrutiny for any compensated taking would be directly contrary to the rulings in *Berman, Midkiff,* and their progeny.[6] Under the petitioners' approach, any taking that contemplated the ultimate transfer of the condemned property to a private entity (whether for purposes of economic development or any other purpose) would provide a direct benefit to that entity and would therefore have to be reviewed under heightened scrutiny. Such an approach would require the reversal of well-established precedent and result in the invalidation of scores of state and federal economic development statutes.

This Court has made it clear that the mere fact that a particular taking may have some incidental benefit to a private entity does not invalidate the taking. *See Joslin Mfg. Co. v. Providence,* 262 U.S. 668 (1923); *2A Nichols on Eminent Domain* (3rd Ed.), § 7.03[5][a] at p. 7-46.

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[6] The petitioners' claim that different levels of scrutiny can be applied to "public use" challenges in much the same manner that different levels of scrutiny are applied to claims under the Equal Protection Clause. Petitioners' Brief at 15-16. This argument ignores the fact that *Midkiff* established that the public use requirement of the Taking Clause is coterminous with a sovereign's police powers. There is no case law that would support applying different levels of scrutiny in this context.

> The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. 'It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.' . . . '[W]hat in its immediate aspect [is] only a private transaction may . . . be raised by its class or character to a public affair.'

Hawaii Housing Authority v. Midkiff, 467 U.S. at 243-44 (internal citations omitted). If the purpose of the taking is primarily to serve a public benefit, then that same public use continues after the property is transferred to a private entity. *International Paper Co. v. United States*, 282 U.S. 399, 408 (1931). The operative issue, therefore, is whether the purpose of the taking is to serve a public benefit. This inquiry is inherently fact specific. As discussed in section 3 below, this factual issue was addressed in detail by the trial court, which rejected petitioners' claim that the primary purpose of the taking at issue was to benefit a private entity (Yarde Metals). (*See* Trial Court Decision in Petitioners' Appendix at App. 35).

2. Petitioners' "Heightened Scrutiny" Claim Is Grounded In State Constitutional Law.

As discussed above, there is absolutely no support in any federal decisions for the "heightened scrutiny" standard advanced by petitioners. The petitioners' argument is based upon decisions of the Michigan and Delaware

Supreme Courts that purport to apply heightened scrutiny to public use claims where a taking results in a benefit to a specific and identifiable private entity. *See City of Lansing v. Edward Rose Realty*, 442 Mich. 626, 638-39, 502 N.W.2d 638 (1993), *citing Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 634-35, 304 N.W.2d 455 (1981); *Wilmington Parking Authority v. Land With Improvements*, 521 A.2d 227, 231 (*citing Poletown*). A brief review of these decisions demonstrates, however, that the origin of the "heightened scrutiny" standard lies in state constitutional law first enunciated by the Michigan Supreme Court in the *Poletown* case. The test appears to have been applied by the Delaware Supreme Court (and by subsequent decisions of the Michigan Supreme Court) in cases involving federal constitutional issues without any discussion or analysis of whether the test is consistent with federal law. *See id.*

The "heightened scrutiny" standard relied upon by petitioners originated in the 1981 decision of the Michigan Supreme Court in *Poletown Neighborhood Council v. City of Detroit, supra.*[7] Significantly, *Poletown* did not involve any federal constitutional issues. Rather, the sole constitutional issue in that case was whether the taking of a large tract of land by the Detroit Economic Development Council for subsequent conveyance to General

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[7] The respondents are unaware of a single decision prior to *Poletown* discussing or applying heightened scrutiny to a public use issue. Moreover, respondents were unable to find a single federal court decision that has cited *Poletown*, although the heightened scrutiny standard adopted in Poletown has been discussed and rejected by the Second Circuit. *See AMSAT Cable Ltd. v. Cablevision*, 6 F.3d 867, 875 (2nd Cir. 1993).

Motors for an assembly plant constituted a taking for a private use in violation of Article 10, § 27 of the Michigan Constitution. 410 Mich. at 628-29. In announcing the "heightened scrutiny" standard it was applying, the Court cited no authority – state or federal – in support of this test. *Id.* at 634-35. The *Poletown* court ultimately affirmed the trial court's factual determination that the public interest was the predominant interest being advanced and therefore held that the taking was valid. *Id.*

In subsequent decisions, the Michigan Supreme Court has applied the *Poletown* "heightened scrutiny" test in cases involving (unlike *Poletown*) both state and federal constitutional claims regarding the public use issue. *See City of Lansing v. Edward Rose Realty*, 442 Mich. at 638-39; *Tolksdorf v. Griffith*, 464 Mich. 1, 9, 626 N.W.2d 123 (2001). However, in neither of these cases did the court ever expressly address the question of whether the *Poletown* test is inconsistent with federal law, nor did the court discuss the state constitutional roots of the test. Similarly, the Delaware Supreme Court adopted the *Poletown* "heightened scrutiny" test without discussing or noting that *Poletown* was based on state constitutional law. *Wilmington Parking Authority v. Land With Improvements*, 521 A.2d at 231. Moreover, in *Wilmington Parking Authority* the court never even discussed whether the *Poletown* test is inconsistent with federal law. The only court that has actually addressed *Poletown's* roots in state constitutional law concluded that the "heightened scrutiny" test is

contrary to federal law.[8] *See AMSAT Cable Ltd. v. Cablevision Ltd. Partnership*, 6 F.3d at 875.

The conflict between the highest appellate courts in Connecticut, Michigan, and Delaware is therefore not a significant conflict warranting the review of this Court because: (1) the Michigan and Delaware decisions are clearly contrary to federal law; (2) the conflict arose not from a reasoned analysis of federal law but rather from the borrowing of a test that has its origins in state constitutional law; (3) the Michigan and Delaware courts never even considered or evaluated how the *Poletown* test compares to the standard of review applied by federal courts following *Midkiff*.[9]

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[8] In addition to the decision of the Connecticut Appellate Court, at least one other state court has rejected "heightened scrutiny" in the context of a public use challenge to a condemnation, but it did not expressly discuss the state constitutional origin of the *Poletown* test. *See Minneapolis Comm. Dev. Agency v. Opus Northwest, LLC*, 582 N.W.2d 596, 599 (Minn. Ct. App.), *review denied*, 1998 Minn. LEXIS 779 (1998) (holding that heightened scrutiny is contrary to both the national trend and Minnesota precedent); *cf. Acco Unlimited Corp. v. City of Johnston*, 611 N.W.2d 506 (Iowa 2000) (in equal protection challenge to condemnation, property owner conceded that heightened scrutiny did not apply because claim did not involve a fundamental right or suspect classification).

[9] The petitioners' reliance upon decisions from New Jersey and Indiana is misplaced. *See* Petitioners' Brief at 13 n.9. As petitioners concede, the New Jersey Supreme Court's only statement on this issue has been in dicta. *See City of Atlantic City v. Cynwyd Investments*, 148 N.J. 55, 73, 689 A.2d 712 (1997). Moreover, neither of the New Jersey decisions cited by petitioners include any discussion or analysis of the *Poletown* test's origins in Michigan constitutional law, nor do they evaluate whether "heightened scrutiny" is contrary to federal

There is a second reason why the decisions of the Michigan and Delaware Supreme Courts do not, at least at this time, create a conflict that is worthy of the time and attention of this Court. Despite the appellation of "heightened scrutiny," one could question whether the *Poletown* test actually differs from the deferential "rational relation" test applied by federal courts under the *Berman/Midkiff* line of cases. If the Michigan and Delaware courts have truly adopted a "heightened scrutiny" standard (analogous to heightened scrutiny analysis under the equal protection clause), then it is clearly contrary to the decisions of this Court and review is not warranted for that reason. If, however, the *Poletown* court, through the use of the term "heightened scrutiny," simply meant that a trial court addressing a public use issue must consider any evidence that the stated purpose of the taking is pretextual, then the *Poletown* test is not true "heightened scrutiny" analysis and is consistent with federal law. Interpreted in this manner, the *Poletown* test is analogous to a rule of relevance in cases involving public

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law. *See id.*; *Township of West Orange v. 769 Associates, LLC*, 341 N.J.Super. 580, 583-84, 775 A.2d 657 (N.J. App. Div. 2001). Prior to the *Township of West Orange* decision, a New Jersey trial court held that the *Cynwyd* court had not embraced the "heightened scrutiny" standard, but rather simply reaffirmed the settled principle that a condemnation can be invalidated where the stated public purpose differs from the actual purpose of the taking. *Casino Reinvestment Development Authority v. Banin*, 320 N.J. Super. 342, 346 (N.J. Law Div. 1998). Similarly, the decision of the Indiana Supreme Court in *Hawley v. South Bend, Dept. of Redevelopment*, 270 Ind. 109, 383 N.E.2d 333 (1978) is of little relevance here. As petitioners admit, the *Hawley* court did not adopt a "heightened scrutiny" standard.

use issues. Specifically, the *Poletown* test could be construed as simply meaning that where a party contests a taking on the ground that it is for a private benefit, not a public use, then the court must not merely "rubber stamp" the decision of the condemning authority, but must instead consider any evidence of the facts and circumstances surrounding the taking that would tend to show that the true purpose differs from the stated purpose. *Cf. Wilmington Parking Authority v. Land With Improvements*, 521 A.2d at 231 (discussing *Poletown* test and then stating that in reviewing projects where private parties may benefit, the trial court should examine any evidence of the "underlying purpose" of the condemnor); *Hawley v. South Bend, Dept. of Redevelopment*, 270 Ind. at 120 (court must consider all evidence regarding what is the principal use to be made of property). If the *Poletown* test simply means that evidence that a taking is truly for a private benefit must be considered if offered, then it is entirely consistent with federal law.[10]

These two alternative interpretations of the *Poletown* test are mutually exclusive. Either the *Poletown* test represents true heightened scrutiny and is therefore contrary to federal law, or it is simply a rule of relevance and thus there is not a true conflict between the decisions of the

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[10] Even applying a deferential standard of review, Connecticut courts have struck down takings where there was sufficient evidence that the stated purpose of the taking was pretextual. *See Avalonbay Communities, Inc. v. Orange*, 256 Conn. 557, ___ A.2d ___ (2001) (invalidating taking of land for purported purpose of developing an industrial park where real purpose was to prevent development of subject parcel for affordable housing).

highest courts in Connecticut, Michigan, and Delaware. Under either interpretation, the petitioners' writ should be denied. Moreover, the fact that neither the Michigan nor Delaware Supreme Courts specifically addressed the state constitutional origins of the *Poletown* test suggests that this conflict between state courts – if it is indeed a true conflict – has not been addressed with sufficient clarity by the state courts so as to warrant this Court's review of the issue at this time.

3. The Factual Predicate For The Petitioners' Claim Was Rejected By The Trial Court.

The writ should also be denied because the petitioners' entire claim rests upon a factual claim that was rejected by the trial court after thoroughly considering all the evidence offered by petitioners in support of their contention that the purpose of this taking was to benefit a local manufacturer named Yarde Metals, rather than to obtain the economic development benefits of job creation and an increased tax base. This was not a case where the trial court merely "rubber stamped" the decision of the City of Bristol to exercise the power of eminent domain without examining evidence regarding the origin and underlying purpose of the project. Rather, the trial court conducted several days of hearings at which the petitioners' counsel extensively questioned the director of the Bristol Development Authority, the mayor of the City of Bristol, and the president of Yarde Metals regarding petitioners' claim that the purpose of this taking was to benefit Yarde Metals. After hearing all this testimony and

reviewing the numerous documentary exhibits, the trial court found that:

> [a]lthough the city had numerous discussions with and made plans to have Yarde Metals as an anchor tenant in the proposed industrial park, no agreement or contract, written or oral, was made with Yarde Metals. Furthermore, and more telling, the evidence shows the city plans on developing the industrial park whether or not Yarde Metals indeed becomes a tenant. This court notes that even if Yarde Metals becomes the hoped-for anchor tenant, it will have to comply with the developmental plan as approved by Bristol's Developmental Board and City Council. Therefore, this court finds that the homeowners' claims of constitutional right violations are without merit.

(Trial Court Decision, Petitioners' Appendix at 35).

Even in the unlikely event this Court were to grant certification and ultimately adopt a "heightened scrutiny" test, it is hard to conceive how the analysis on remand would be any different from the thorough analysis of the public use issue conducted by the trial court. The petitioners cite no evidence on the "private/public" use issue that was excluded by the trial court, nor do they even attempt to explain how "heightened scrutiny" could change the trial court's factual findings in any manner. The simple truth is that the trial court, after conducting a detailed analysis of the petitioners' factual claims regarding the purpose of this taking, rejected their claim that the purpose of this industrial park was to benefit Yarde Metals. Having been unsuccessful in attempting to convince the trial court that the underlying purpose of the

industrial park at issue was to benefit Yarde Metals, the petitioners now raise this standard of review issue in this petition.

Moreover, even if this Court were to grant certification, the "heightened scrutiny" issue should not even be reached unless the trial court was clearly erroneous in determining that this taking was not designed to benefit Yarde Metals. In their petition for certification to the Connecticut Supreme Court, the petitioners expressly recognized that their "heightened scrutiny" claim was dependent upon a factual argument that the trial court rejected. Specifically, the petitioners asked the Connecticut Supreme Court to review the following two questions:

> A. When condemnation authority is exercised in such a manner that it is designed to benefit a specific and identifiable private interest, should the Court apply heightened scrutiny in determining whether the predominant interest being advanced is the public interest?
>
> B. If the answer to the preceding question is in the affirmative, did the Court err in failing to apply the strict scrutiny in the instant case.

(Petition for Certification to Connecticut Supreme Court at pp. 1-2). Noticeably absent from the petition for a writ of certiorari to this Court is any reference to the second question above, namely, whether there are sufficient facts in this record to establish that the trial court should have applied heightened scrutiny in this case. The trial court's factual findings that Yarde Metals never committed to the project, and that the industrial park would proceed with or without Yarde Metals, preclude the application of

heightened scrutiny here, even if this Court were to rule that it should apply in some circumstances.

The factual circumstances of the present case should be contrasted with those in the Michigan and Delaware cases where heightened scrutiny was applied. For example, in *Poletown*, the City of Detroit was condemning an entire neighborhood comprising a 465-acre tract for a single user – General Motors. *Poletown*, 410 Mich. at 636-37. In contrast, the Southeast Bristol Mini-Industrial Park will include twelve-fifteen lots to be occupied by multiple users. Moreover, unlike the present case, there was no issue in *Poletown* as to whether General Motors would purchase the site if the City acquired it, and there was no evidence that the City would have proceeded with the taking absent General Motors' involvement. Here, the trial court expressly found that Yarde Metals never committed to the industrial park and that the City planned to develop the park even without Yarde Metals' involvement as a tenant. (Trial Court Decision at Petitioners' Appendix 35). Similarly, in *Wilmington Parking Authority v. Land With Improvements*, 521 A.2d 227 (1986), there was no evidence of any doubt that the private entity allegedly benefited would ultimately participate in the project, nor was there any evidence that the project would have proceeded without that entity's involvement.

In sum, the trial court's decision demonstrates that it engaged in the type of review that petitioners assert was necessary, namely, an inquiry into the facts and circumstances underlying this taking. Having considered this evidence carefully, the trial court rejected petitioners' factual claim that the respondents exercised the eminent domain power in order to directly benefit a specific and

identifiable private interest. The petitioners' request for this Court's review of the "heightened scrutiny" issue is therefore precluded by the factual rulings of the trial court.[11]

4. The Case Is Moot.

The final reason why the petition should be denied is that this case is now moot because of events that occurred while this matter was pending before the Connecticut Appellate Court. "[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed" as moot. *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992); *Calderon v. Moore*, 518 U.S. 149, 150 (1996). The premise of the petitioners' entire case no longer exists because Yarde Metals ultimately decided to move its operations to another town in Connecticut due to the long delay caused by this litigation. Specifically, Yarde Metals purchased an existing industrial plant in the

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[11] Because the petitioners' claim is based upon the factual predicate that the City exercised "its condemnation authority in such a manner as to directly benefit a specific and identifiable private interest, the respondents have raised a second question for certification (should this Court grant certiorari on the issue raised by petitioners) as to whether this predicate finding exists here. Specifically, if the Court grants the petition, the respondents seeks certiorari on the issue of whether the record in this case warrants the application of heightened scrutiny given the trial court's findings that the purpose of the taking was to develop an industrial park that would proceed with or without Yarde Metals' involvement.

neighboring town of Southington, Connecticut in March of 2001 and thus will not be relocating to the Southeast Bristol Mini-Industrial Park. (During the trial, Yarde Metals' owner had testified that he had begun looking at industrial properties in other towns and had to move forward in the near future with a decision on relocation.)

The decision of Yarde Metals to relocate to another town renders this case moot because the only issue for which petitioners seek certification is whether the trial court should have applied heightened scrutiny to the public use issue due to the alleged involvement of Yarde Metals in this project. In the event that this Court were to grant certification and overrule the *Berman/Midkiff* line of cases, the most that petitioners could hope for is a remand to the Connecticut courts for a determination as to: (1) whether heightened scrutiny should be applied to the facts of this case; and (2) if so, whether the taking is valid under the heightened scrutiny test.

The outcome of such a remand is preordained and therefore this Court cannot provide petitioners with any practical relief. On remand, the petitioners would presumably offer evidence in support of their claim that Yarde Metals allegedly receives a direct benefit from this condemnation and therefore the taking is not for a public use. The respondents would then introduce evidence concerning Yarde Metals' relocation to Southington and Bristol's plans to proceed with the industrial park, thereby mooting petitioners' entire case. The very fact that the City of Bristol is still proceeding with the plans for development of this industrial park (despite the loss of Yarde Metals as a potential tenant) substantiates the trial court's factual finding that the purpose of this project was never

to benefit Yarde Metals, and that the project would go forward with or without the involvement of Yarde Metals.

The petitioners are well aware of Yarde Metals' relocation to Southington. The respondents are hard pressed to understand why petitioners have sought certiorari because petitioners simply will not be able to obtain the relief they ultimately seek – an injunction of the taking. The most the petitioners can obtain from this Court's granting of certification is a Pyrrhic victory requiring a remand whose outcome has already been determined. While the pursuit of such victories may be a noble endeavor, the petitioners have wholly failed to provide this Court with any reasons why it should address an argument that, in addition to being moot, is contrary to its long-settled precedent, does not represent a significant conflict among state courts, and relies upon a factual predicate that was rejected by the trial court.

CONCLUSION

For the foregoing reasons, the respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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